

No. 12102

United States
Court of Appeals
for the Ninth Circuit

JOE BALESTRIERI AND COMPANY,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

FEB - 1 1949

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

JOHN L. FLYNN,
LOUIS JANIN,
HAROLD E. HAVEN,
DUDLEY F. MILLER.

For Respondent:

A. W. NYQUIST.

Docket No. 12834

JOE BALESTRIERI AND COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1947

Jan. 6—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 7—Copy of petition served on General Counsel.

Feb. 20—Motion to dismiss the proceedings for failure properly to prosecute filed by General Counsel.

Feb. 24—Hearing set March 26, 1947, Washington, D. C. on respondent's motion.

Mar. 21—Motion for leave to file the attached amended petition (verification) filed by taxpayer. 3/21/47 Granted.

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Mar. 21—Order that the respondent's motion to dismiss is denied and this proceeding is stricken from the calendar for March 26, 1947 entered.

Mar. 24—Copy of motion to amend and order served on General Counsel.

Apr. 15—Answer filed by General Counsel.

Apr. 15—Request for hearing in San Francisco filed by General Counsel.

Apr. 18—Notice issued placing proceeding on San Francisco calendar. Service of answer and request made.

Aug. 22—Hearing set Nov. 3, 1947, San Francisco.

Nov. 3—Hearing had before Judge Tyson on petitioner's motion to continue, agreed to by respondent. Motion granted. Continued to next calendar. Affidavit and motion for continuance filed at hearing. Copy served.

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Jan. 26—Hearing set March 22, 1948, San Francisco.

Mar. 25—Hearing had before Judge Kern on merits. Petitioner's motion to substitute counsel granted. Petitioner granted 15 days leave to amend petition. Respondent granted 15 days to file answer. Motion to substitute counsel, motion to file amendment to answer and answer, amended petition and notices of appearance of Louis Janin, Harold E. Haven and Dudley F. Miller as counsel filed at

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hearing. Briefs due May 19, 1948; replies June 14, 1948.

Apr. 19—Motion to file answer to amended petition, answer to amended petition lodged, filed by respondent.

Apr. 21—Above motion to answer to amended petition granted, answer filed.

Apr. 21—Transcript of hearing 3/25/48 filed.

Apr. 21—Transcript of hearing 3/26/48 filed.

May 19—Brief filed by taxpayer. 5/21/48 Copy served.

May 20—Brief filed by General Counsel.

June 14—Reply brief filed by General Counsel. Served 6/15/48.

June 14—Reply brief filed by taxpayer. 6/15/48 Copy served. [1 *]

Aug. 2—Memorandum findings of fact and opinion rendered, Judge Kern. Decision will be entered for the respondent. 8/3/48 Copy served.

Aug. 3 —Decision entered, Judge LeMire, Div. 5.

Aug. 30—Motion to correct and enlarge findings of fact and opinion filed by taxpayer. 9/7/48 Denied.

Aug. 30—Motion to vacate decision filed by taxpayer. 9/7/48 Denied.

Aug. 30—Motion for reconsideration filed by taxpayer 9/7/48 Denied.

Aug. 30—Alternative motion for rehearing filed by taxpayer. 9/7/48 Denied.

* Page numbering appearing at foot of page of original certified Transcript of Record.

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Nov. 1—Petition for review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

Nov. 2—Proof of service filed.

Nov. 5—Designation of record filed by taxpayer with acceptance of service 11/17/48 thereon. [2]

The Tax Court of the United States.

Docket No. 12834

JOE BALESTRIERI & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION

Pursuant to leave of the Court first had and obtained to file an amended petition conforming to proof, the above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency. Bureau Symbols IRA:90-D-RR (C:TS:PD:SF:EDR) dated October 8, 1946, and as the basis of its proceedings, alleges as follows:

1. The petitioner is a corporation with its office formerly located at 432 Clay Street, San Francisco, California, but now located at 123 Jackson Street, San Francisco. The return for the period involved was filed with the Collector for the First District of California.

2. The notice of deficiency, a copy of which, together with page 5 of the statement annexed thereto, is attached [27] hereto and marked Exhibit A, was mailed to petitioner on October 8, 1946.

3. The taxes in controversy are excess profits taxes for the year ending December 31, 1943, the deficiency asserted therefor being \$25,021.70, and the amount in issue being approximately \$20,000.00.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in denying the loss of \$22,229.37, or any part thereof, resulting from a business venture between the petitioner and Strategic Mineral Exploration Co., a partnership.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a corporation, incorporated February 15, 1941, under the laws of the State of California, and operates a wholesale fish business.

(b) At all times material, Joe Balestrieri and W. E. Otto were directors and the sole shareholders of petitioner. W. E. Otto was vice-president and Joe Balestrieri was president.

(c) In July of 1943, the partnership under the name of Strategic Mineral Exploration Co. was formed by and between Joe Balestrieri, W. E. Otto and J. M. Hoff, a mining engineer, for the purpose of carrying on a mining [28] and milling business with respect to chrome ore. On July 29, 1943, the partners filed a certificate of doing business under

a fictitious name with the County Clerk of the City and County of San Francisco, State of California. Said partnership attempted to obtain financing for this venture from Pacific Vegetable Oil Corporation, a concern with which petitioner had many business dealings. Pacific Vegetable Oil Corporation agreed to participate in the milling end of the venture but only if a guarantee against loss were obtained by the partnership from petitioner corporation.

(d) Petitioner corporation on July 26, 1943, in exchange for 50% of the profits from the milling venture agreed with Strategic Mineral Exploration Co. to bear any losses which might be sustained by such venture.

(e) Contrary to expectations, the venture proved unsuccessful and resulted in a loss of \$22,229.37, at the time of its termination in November, 1943. The other activities of Strategic Mineral Exploration Co. were terminated at the same time and the total loss then determined for all of the activities of said partnership was then believed to be some \$34,000; however, several thousand dollars of additional obligations were subsequently discovered and paid.

(f) In November of 1943 petitioner issued its promissory note to Pacific Vegetable Oil Corporation for the [29] amount of \$22,229.37, which amount the latter corporation had advanced to Strategic Mineral Exploration Co. in connection with its milling venture with petitioner, and which was lost in the operations of said venture.

(g) Petitioner entered into said venture with the expectation of realizing very substantial profits therefrom, Mr. Hoff, mining engineer, representing that a minimum profit of \$50,000 per month could be expected, and the officers and directors of petitioner felt that the agreement between it and Strategic Mineral Exploration Co. was exceedingly favorable to petitioner.

(h) Petitioner is informed and believes, and therefore alleges the fact to be that under the foregoing circumstances it is entitled to deduct the full amount of its share of the loss of the joint venture between itself and Strategic Mineral Exploration Co., to wit, the whole thereof, or \$22,229.37.

Wherefore, Petitioner prays that this Court hear the proceeding and determine that petitioner is entitled to the said loss of \$22,229.37, and redetermine the deficiency in accordance therewith, and for such other and further relief as may be meet and proper under the circumstances.

Dated March 29, 1948.

JOE BALESTRIERI & CO.,

By /s/ JOE BALESTRIERI,

President.

[30]

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

/s/ DUDLEY F. MILLER,

Counsel for Petitioner.

State of California,
City and County of San Francisco—ss.

Joe Balestrieri, being first duly sworn, deposes and says:

That he is president of the petitioner above named, and as such is authorized to verify the foregoing petition; that he has read the same and is familiar with the statements therein contained, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters that he believes it to be true.

/s/ JOE BALESTRIERI.

Subscribed and sworn to before me this 29th day of March, 1948.

(Seal)

ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: T.C.U.S. Filed March 29, 1948. [31]

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition in the above proceeding, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition except that respondent alleges that the deficiency asserted is in the amount of \$25,021.71.

4. Denies the allegations of error contained in paragraph 4 of the amended petition and in subparagraph (a) thereunder.

5 (a) and (b). Admits the allegations contained in paragraph 5(a) and 5(b) of the amended petition. [37]

(c) Admits the allegations contained in the first three sentences of paragraph 5(c) of the amended petition; denies the remaining allegations contained in said paragraph.

(d) and (e) Denies the allegations contained in paragraph 5(d) and 5(e) of the amended petition.

(f) Admits that in November of 1943 petitioner issued its promissory note to Pacific Vegetable Oil Corporation for the amount of \$22,229.37, which amount the latter corporation had advanced to Strategic Mineral Exploration Co. in connection with its milling venture with petitioner; denies the remaining allegations contained in paragraph 5(f) of the amended petition.

(g) and (h) Denies the allegations contained in paragraph 5(g) and 5(h) of the amended petition.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Respondent.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
T. M. MATHER,
C. W. NYQUIST,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 21, 1948. [38]

Before the Tax Court of the United States.

Docket No. 12834

In the Matter of: JOE BALESTRIERI & COM-
PANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Court Room, U. S. Appraisers Building,
630 Sansome Street, San Francisco, Calif.

March 25, 1948—12:05 p.m.

(Met pursuant to notice.)

Before: Honorable J. W. Kern, Judge.

Appearances: Louis Janin, Esq., 1104 Mills
Tower, San Francisco, California, appearing on

behalf of Joe Balestrieri & Company, Petitioner. C. W. Nyquist, Esq., (Honorable Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [41]

PROCEEDINGS

Mr. Haven: Is the Balestrieri case on your calendar?

The Court: Yes, sir, at two o'clock.

Mr. Haven: Could I refer to that for a minute? We have just been substituted in the case and I have a motion of substitution here. It is a peculiar situation.

The Court: You have been asked to substitute as counsel for taxpayer in the Balestrieri case?

Mr. Haven: Yes, your Honor. I am speaking of it now, because it may affect time. The party who signed the petition in this case, as I understand it, was not admitted to the Tax Court, an attorney, J. L. Flynn. He was supposed to try it and applied for admission to the Tax Court, and has not been admitted. William Acton, the Deputy in the District Attorney's office and friend of mine of long standing, called me yesterday afternoon and asked me if I could stand by, and I told him I was engaged in the trial this morning, that he would have to talk to my partner, Mr. Janin. The result has been that this morning they called up and asked us to appear in the case because they had no party of record in it, no party admitted to practice in the Tax Court to appear for them.

Mr. Acton is General Counsel of the Petitioner. He didn't discover, according to his statement to me, that he was not going to be represented in the Tax Court by proper counsel until just as he called me, about two o'clock yesterday, and of [42] course we would like to have the matter go over to the next calendar.

The Court: Under the circumstances, I would—

Mr. Haven: But Mr. Janin who is working on the case now would at least like to have the balance of the day.

The Court: I am sorry, I don't see how I could do anything other than call it just in order, because such a thing is inexcusable. I realize that your office had nothing to do with it, Mr. Haven, but we will have to go ahead with it just as soon as we get to it.

Mr. Haven: One fact further I might state: I think that Mr. Fabian Brown answered the calling of the calendar, didn't he?

The Court: The only person I know that answered was a man named Flynn.

The Clerk: Mr. Flynn answered the call.

Mr. Haven: Fabian Brown was the one who was supposed to try it, and they just discovered yesterday he wasn't admitted to the Court.

The Court: I think that I can't do anything on that, Mr. Haven, except stay right directly with it, and your office will just have to do the best they can with it.

Mr. Haven: I am sorry for Mr. Janin. I was fortunate. I had at least a day or two to get ready when I found I had to try a case. [43]

May I at least file these with the Clerk?

The Court: The motion for substitution or for the entries of appearance?

Mr. Haven: Both the motion to substitute counsel and note of appearance. I don't ask you to act on them now.

The Court: They will be filed.

(Whereupon, at 12:10 p.m., a recess was taken until 5:30 p.m. of the same day.) [44]

Afternoon Session—5:30 p.m.

The Court: I will now call the case of Joe Balestrieri & Company.

Will counsel state their appearances for the record, Joe Balestrieri & Company, 12834.

Mr. Janin: Louis Janin, appearing for the Petitioner.

Mr. Nyquist: C. W. Nyquist for Respondent.

The Court: May I have a statement as to the issues?

Opening Statement on Behalf of the
Petitioner

By Mr. Janin:

Mr. Janin: If your Honor please, I think the issue involved can be rather simply stated, reduced to its essentials.

In 1943, in July of 1943, the two shareholders who are interested in the petitioner corporation formed a partnership with a third man who is a mining engineer. They expected that this partnership would be a very successful operation. Funds were required to start off their venture, and they were without the means with which to finance it.

The corporation at that time was prospering, and they were told by a creditor, with respect to the source of funds, that they could obtain credit for their operation if the losses were guaranteed by the corporation.

They thereupon, that is, the partnership thereupon entered into an agreement with the corporation whereby in exchange for a 50 percent interest in the profits of the venture, [45] the corporation would assume all losses. I might say that there were two ventures in reality involved. One was a mining venture and one was a milling venture. It was only with respect to the milling venture that the corporation taxpayer participated with the partnership. In other words, we have two entities, a corporation and a partnership, and a third entity or semi-entity, a joint venture between the other two entities.

The venture was not as successful as had been anticipated, and as the picture had been painted by the mining engineer, and consequently, instead of the large profit that had been expected a large loss was sustained in rather short order. The share of the loss of the corporation was some \$22,000, which is the one item that is involved in this proceeding.

In November of 1943 the venture was terminated, the partnership ceased its operations, and on the tax return for that year the corporation claimed the loss of \$22,000.

The Court: That loss of \$22,000 is the only item which is in dispute?

Mr. Janin: That is the only item which is in dispute in this proceeding.

The Court: Mr. Nyquist.

Opening Statement on Behalf of the Respondent
By Mr. Nyquist:

Mr. Nyquist: The Respondent's position in this matter [46] is that the agreement on the part of the petitioner corporation was not an agreement to insure the partners against loss. It was merely a guarantee to the creditor who loaned money to the partnership that that creditor would not suffer loss upon the credit that he extended.

The petitioner corporation entered into the arrangement for the convenience and benefit of its two stockholders, and the loss to the extent that the corporation may have sustained the loss constitutes an item for which it is reimbursable by the stockholders. It is merely a contract of guarantee.

The corporation voluntarily paid the creditor. There is no showing that demand has ever been made upon the individual partners by the creditor for payment or any default by the partners on the payment to the creditor; that the corporation petitioner herein voluntarily assumed the obligation, and under California law, assuming, as the Respondent contends, that the contract was merely one of guarantee, the corporation has a valid claim against the individual partners. Therefore, the corporation suffered no deductible loss since there has been no showing it was unable to collect from the partners.

Furthermore, even assuming, as the petitioner contends, that the contract was not entered into

for the protection of the creditor, but was a guarantee which was entered into that the corporation would insure the partnership against loss, the contract was not entered into for a business purpose by the [47] corporation, the amounts paid thereunder do not constitute ordinary or necessary business expenses and do not constitute expenses in a transaction entered into for profit, and that this payment—by the way, Respondent does not concede that payment was made in the taxable year by the corporation, although I understand that payment was made in a subsequent year and a note given in the taxable year—am I correct in that?

Mr. Janin: Yes, a note was given in the taxable year and payments were made on it. I imagine there were some small payments made in the taxable year, but not of any great importance.

Mr. Nyquist: Respondent contends that whatever payments the corporation may have made here in effect constituted a dividend to the corporation's two stockholders, Mr. Balestrieri and Mr. Otto.

The Court: From counsel's statement it would seem to be an interesting question, but practically one of law. I shouldn't think there would be much difference between the parties with regard to the facts.

I see in the petition that it is alleged there was a resolution of the Directors of the taxpayer corporation covering this guarantee. I assume that that is available, and the contract itself, is that in writing?

Mr. Janin: That was in the form of an offer and an acceptance. [48]

The Court: In writing?

Mr. Janin: It is in writing, yes, your Honor.

The Court: I also understand, however, that counsel for petitioner was called in at the last minute in this case, but I am wondering if the documents in this case with which you probably are familiar, Mr. Nyquist, couldn't be gotten into the record by stipulation?

Mr. Nyquist: Yes. I have indicated to counsel for the petitioner that I would be glad to stipulate to that letter and to the merits of the Director's meeting. There was a letter from the partnership to the corporation making an offer, and the minutes of a Director's meeting authorizing the acceptance of that offer. Subject to petitioner's copy reading the same as my copy, I would be glad to stipulate to that.

The Court: I also suppose that the terms of the note are in evidence. You have a copy of the note that was given in payment?

Mr. Janin: I do not have a copy of the note. That is not in the possession of the taxpayer corporation, and the creditor corporation cannot, or at least the officers of the creditor corporation have not been able to locate the note, although request has been made for it.

Mr. Nyquist: Has the note been paid?

Mr. Janin: I believe it has been paid in full.

The situation is this: As far as the books of the [49] taxpayer are concerned, there have been other

note obligations to the same creditor. A general account was set up on the books of the taxpayer corporation, and no credits appear with respect to this particular note. So that it still stands on the books in its original amount, though I understand at the other end of the transaction it has been treated as having been fully paid. I don't think that the fact of payment is material in the proceeding.

The Court: Let's go ahead as much as we can then, gentlemen.

Mr. Nyquist, if I interrupted you, I am sorry. Did you have anything else that you wanted to say?

Mr. Nyquist: I might say that the Respondent has not conceded the amount of the loss sustained by the partnership. I don't know to what extent that is material to your case as you wish to present it. I presume if you had been in on the case earlier you probably would have been in with the books and we would have had that stipulated.

Mr. Janin: That, of course, is correct. Again, I don't think that the larger loss sustained by the partnership itself is really material to the proceeding. I do not have the books of the partnership available in the courtroom, and I understand that there is considerable doubt as to whether they are in existence.

The Court: Let's go ahead as far as we can, if you [50] have finished, Mr. Nyquist.

Mr. Nyquist: Yes sir, I have finished.

Mr. Janin: May I suggest that we start off by introducing in evidence the documents as to which there is no dispute? I think that will speed the proceeding.

Mr. Nyquist: I agree to that.

Mr. Janin: I will introduce in evidence as Petitioner's Exhibit 1 a letter from Strategic Mineral Exploration Company to Joe Balestrieri, dated July 24, 1943.

The Court: Admitted in evidence.

The Clerk: Exhibit 1.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 1.)

Mr. Nyquist: How about the minutes? That should be next.

Mr. Janin: I will offer in evidence as Petitioner's Exhibit 2, Minutes of a Special Meeting of the Board of Directors of Petitioner Corporation, July 26, 1943.

Mr. Nyquist: No objection.

The Court: Accepted in evidence.

The Clerk: Exhibit 2.

(The Minutes referred to were marked and received in evidence as Petitioner's Exhibit No. 2.)

Mr. Janin: I will offer in evidence a letter of the petitioner corporation to Strategic Mineral Exploration Company, [51] dated July 26, 1943, accepting the offer of Strategic Mineral Exploration Company.

Mr. Nyquist: No objection.

The Clerk: Exhibit 3.

The Court: Accepted in evidence.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 3.)

The Court: I understand not only is there no objection, but that Respondent admits that these documents are what they purport to be.

Mr. Janin: Yes. These are true and correct copies.

Mr. Nyquist: Respondent admits these are true and correct copies of the original documents. There may be some inconsistency within the document that might require some explaining, perhaps; but these are true and correct copies of the original documents.

The Court: All right.

Mr. Janin: I will offer into evidence a copy of the Articles of the co-partnership, dated July 1, 1943, between John M. Hoff, Joe Balestrieri and W. E. Otto; and also as a part of the same exhibit, a certificate of co-partners transacting business under fictitious name, bearing the same date.

The Court: Accepted.

Mr. Nyquist: I will agree to that, provided it be stipulated that that certificate was filed with the County Clerk [52] for the City and County of San Francisco on the 29th of July, 1943, that document.

Mr. Janin: That the certificate was filed with the County Clerk?

Mr. Nyquist: Yes, the certificate of co-partners doing business under a fictitious name was filed on July 29, 1943.

Mr. Janin: I don't know the facts on that, your Honor. but I think that counsel's statement probably correctly represents them.

The Court: All right, it will be admitted in evidence.

The Clerk: Exhibit 4.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 4.)

[Printer's Note]: Petitioner's Exhibit No. 4 is set out in full at page 54 of this printed Record.

Mr. Janin: I will ask Mr. Otto to take the stand at this time.

The Court: Gentlemen, I think we have probably gone as far as we can this evening. I wanted to get in as much as possible, the opening statements and undisputed documents.

Mr. Nyquist: We might put the tax returns in, sir, if you like.

The Court: All right, let's do that.

Mr. Janin: No objection at all.

Mr. Nyquist: As Exhibit A, the corporation income declared value excess profits tax return for the year 1943. [53]

The Court: Accepted in evidence.

The Clerk: Exhibit A.

(The income tax return referred to was marked and received in evidence as Respondent's Exhibit A.)

[Printer's Note]: Respondent's Exhibit A is set out in full at page 58 of this printed Record.

Mr. Nyquist: As Exhibit B, the petitioner corporation's Excess Profits Tax Return for the calendar year 1943.

The Court: Accepted in evidence.

The Clerk: Exhibit B.

(The income tax return referred to was marked and received in evidence as Respondent's Exhibit B.)

[Printer's Note]: Respondent's Exhibit B is set out in full at page 65 of this printed Record.

Mr. Nyquist: Respondent requests the usual leave to withdraw and substitute.

The Court: Leave granted.

How many witnesses will you have, Mr. Janin?

Mr. Janin: I think only two, your Honor.

The Court: I wonder if counsel could come at 9:30 tomorrow morning?

Mr. Janin: That is entirely convenient to me if it is with Mr. Nyquist.

The Court: As you see, I am running behind my schedule here, so I think we will recess this case until tomorrow morning at 9:30.

Mr. Nyquist: May I ask whether it is your Honor's intention to hear the Jamvold case before the Granberg case?

The Court: Yes, I will hear this case at 9:30 until [54] we finish. Then I will begin the Jamvold case, which is scheduled to last about two hours, I think.

Mr. Nyquist: Two to three. I imagine that will take until about lunch time, your Honor.

The Court: Then we get into the Grenberg case. All right, we will recess until 9:30.

(Whereupon, at 5:50 p.m., a recess was taken until 9:30 a.m., Friday, March 26, 1948.) [55]

March 26, 1948—9:30 a.m.

The Court: All right, gentlemen.

Mr. Nyquist: May it please the Court, I have just agreed with petitioner's counsel to save calling one witness by stipulating that Mr. Rocca who is the head of the Pacific Vegetable Oil Corporation, would not have made the loan or extended the credit which is under consideration in this case on the individual credit of Mr. Otto and Mr. Balestrieri, but he extended the credit only because he was protected by this guarantee from the petitioner corporation.

Mr. Janin: That is entirely correct, your Honor.

The Court: All right, it will be so stipulated.

Mr. Janin: Mr. Otto, will you take the stand, please?

Whereupon,

WALTER E. OTTO,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Walter E. Otto.)

Direct Examination

The Clerk: Please be seated and state your name and address.

The Witness: Walter E. Otto, 90 Ramona Ave., Piedmont, California.

By Mr. Janin:

Q. In 1943 what was your connection with the Petitioner [59] corporation, Mr. Otto?

A. I was vice president, not active in the management, but vice president.

Q. Were you also a shareholder of the corporation?

A. Yes, sir, I owned fifty percent of the stock at that time.

Q. What was your relationship to Strategic Mineral Exploration Company?

A. I was a one-third partner in that operation.

Q. Will you explain how that partnership came to be formed?

A. J. M. Hoff, a mining engineer, brought the project in to my office. It consisted of some mining claims and a chrome mill at Dunsmuir, California. He outlined we'd make a minimum of \$50,000 a month if we could provide the capital required to operate the mill.

Q. What did you do—I think we have that covered by stipulation.

What was your own financial condition at that time?

A. Well, outside of the assets I had in the fish company I had practically nothing in the way of liquid cash.

(Testimony of Walter E. Otto.)

Q. Outside of liquid cash what was your financial position?

A. I had no personal strength at all at that time outside of the fish company. interest in the fish company. [60]

Mr. Nyquist: By "fish company" you mean the Balestrieri Corporation?

The Witness: Joe Balestrieri and Company, yes.
By Mr. Janin:

Q. In order to obtain financing for this venture, you approached Pacific Vegetable Oil Corporation?

A. Yes.

Q. You asked them to advance credit?

A. I explained to Pacific Vegetable Oil the proposition. He said, "Reduce it to writing and I will consider it."

I did submit it to him, myself, on behalf of the partnership, and his reply after that was that he would go along with the deal, provided that we'd have the meeting of the Board of Directors of the fish corporation agree to underwrite, or absorb, any loss that might occur. We never thought there could possibly be any loss, we thought it was a bonanza in our lap rather than possible loss.

Q. Referring to Petitioner's Exhibit 1, will you please read the second paragraph of that letter?

A. (Reading document.)

I have.

Q. What was the understanding of the parties with respect to the language used in that letter as follows:

(Testimony of Walter E. Otto.)

“The consideration for this offer is that your corporation agrees to guarantee the payment for any losses or [61] deficits that may occur on the money borrowed from Pacific Vegetable Oil Corporation on our chrome milling venture.”

Mr. Nyquist: Objection, your Honor. The language of the document in itself is clear, and it calls for no parol evidence by way of explanation.

The Court: I will take under advisement the objection. If your premises are correct your conclusion is correct. But I will not at this time be able to give a definitive ruling on whether or not the language is so unambiguous as to not require parol evidence to explain it. That I will not be able to until I give greater study to it, so I will take under advisement your objection.

Mr. Janin: I think, if your Honor please, that the whole nub of the controversy is in the interpretation to be accorded that language, and that there is some real ambiguity in it.

The Court: It is your contention that the mere fact that you and Mr. Nyquist are not able to agree on it means it must be ambiguous.

All right, go ahead.

A. Well, Mr. Rocca realized that there was no individual in the partnership that could stand behind the money to be advanced.

Mr. Janin: That is not responsive to the question.

Would you read the question? [62]

(The question was read by the Reporter.)

(Testimony of Walter E. Otto.)

By Mr. Janin:

Q. Now, the parties are Strategic Mineral Exploration Company and the petitioner corporation, and they are the only parties involved in this communication.

A. We offered Joe Balestrieri, the partnership offered Joe Balestrieri and Company one-half participation in the earnings of that venture, which we thought was very liberal, and in exchange for that they were to guarantee us for any losses that might occur on the venture.

Q. What do you mean by the word "guarantee"?

A. Well, if we ran into difficulties and ran into a loss, they would absorb any loss that might occur.

Q. When you refer to the venture, what venture do you mean? Do you mean the operations of the partnership?

A. Of the partnership. The partnership had two features to it. One was the chrome mill and the other was mining.

Our money obtained from Pacific Vegetable Oil was strictly for the milling venture, and that is why it was \$22,000, and the balance was on the other end of the venture. We lost.

Q. In other words, the agreements of the petitioner corporation related only to the milling venture?

A. That was the reimbursement, that's right.

Mr. Nyquist: May I ask you to be a little careful [63] in leading questions.

(Testimony of Walter E. Otto.)

By Mr. Janin:

Q. What is your explanation for substantially the same language which appears in Petitioner's Exhibit 3 in the reply of the petitioner corporation to the partnership?

A. What was the question again, please? I was reading.

Q. What was your explanation of substantially the same language which appears in the reply?

A. This is Joe Balestrieri and Company's acceptance of the partnership's offer to them.

Q. That is correct, but what is your explanation of the language there? I refer particularly to—

A. That they accepted the proposal, and in consideration of the 50 percent participation that they would have in the profit, that they would absorb any losses that might occur.

Q. I will hand you Petitioner's Exhibit 2, which is the minutes of the meeting of the Board of Directors of the petitioner corporation, on July 26, 1943. In the minutes of said meeting, reference is made to a participation in one-fourth of the earnings of the chrome milling venture. Can you give any explanation why in the two prior exhibits, that is, Exhibits 1 and 3, reference is made to one-half, and in this exhibit reference is made to one-fourth?

A. That is strictly a typographical error. That was given to the secretary to draw up with the letters, and it was [64] read in there. How that

(Testimony of Walter E. Otto.)

occurred I cannot explain. It did, and we can't change the record.

Q. What was the understanding of the parties with respect to the participation?

A. One-half.

Q. Have you the books here of Strategic Mineral Exploration Company? A. No, sir.

Q. Why aren't those books in the court room?

A. Well, I only heard of this yesterday, day before yesterday lunch time, and then I had to, with Mr. Balestrieri, obtain counsel. Then, the books have been in a flux. The Strategic Mineral was a failure, and we set up our loss and we had outside accountants go over that and do it, because there were various interested parties. I looked for those books, but so far I couldn't put my fingers on them, but they are somewhere. I don't know where.

Q. You don't know where they are?

A. I haven't been able to put my fingers on them.

Q. As a matter of fact, we both looked for them last night, didn't we?

A. You might ask Mr. Balestrieri if those books were located.

Did you find the Strategic Mineral books?

Mr. Balestrieri: Here it is. [65]

By Mr. Janin:

Q. Mr. Otto, I show you an account—

Mr. Nyquist: Objection. May we have the books identified first?

(Testimony of Walter E. Otto.)

The Court: The Clerk unfortunately is not here right now. Could we go ahead with the questions?

Mr. Nyquist: I just want the witness to at least testify these were the books.

By Mr. Janin:

Q. Is this the general ledger of Strategic Mineral Exploration Company? A. Yes, sir.

Q. I show you an account in this book entitled, "Pacific Vegetable Oil Company," and ask you what that account represents.

A. That was the amount of money that was due the Pacific Vegetable Oil Corporation and which was paid, which had to be absorbed by Joe Balestrieri and Company.

Mr. Nyquist: I move that the last part of the answer be stricken as not responsive to the question and a conclusion and opinion of the witness.

The Court: I will have to ask the Reporter to read the answer to me.

(The answer was read by the Reporter.)

The Court: Objection overruled. [66]

By Mr. Janin:

Q. What is the closing balance shown in that account? A. \$22,229.37.

Mr. Nyquist: I object to that too, your Honor. That is not a journal or book of original entry. It is merely a ledger sheet with a number of figures there, with nothing on that page to show the origin of the figures.

The Court: Objection overruled. You can bring that out on cross examination, Mr. Nyquist.

(Testimony of Walter E. Otto.)

By Mr. Janin:

Q. How long did Strategic Mineral Exploration Company remain in existence?

A. Well, we started in July, we got running, I guess the beginning of August, we ran about 90 days and then we closed up as rapidly as we could. We lost.

Q. What was the result of the operations during that period?

A. Well, in 90 days we lost better than \$34,000, and subsequently to that there was another, I imagine from \$6,000 to \$10,000. We had to pick up stray odds and ends we didn't know of at the time we tried to liquidate.

Q. What did the petitioner corporation and this partnership do in conjunction with the winding up of the partnership?

A. We paid our bills—what is the question again, [67] please?

Q. I will see if I can rephrase that.

Let me ask you a further question: How did you pay your bills?

A. I imagine we were about a year, year and a half paying those bills. We paid them as fast as we could arrange the money to liquidate. The corporation paid Pacific Vegetable Oil weekly sums, as I recall, from \$250 to \$2500, maybe \$500, maybe \$1,000.

The other outside bills Mr. Balestrieri and I—Hoff reneged on the entire venture and relations were very bitter. We blamed him for the fiasco, and he walked out on us. Mr. Balestrieri and I, we

(Testimony of Walter E. Otto.)

couldn't have any of our affairs attached, so we made arrangements and paid everybody just as fast as we could.

I would say we were a good year to a year and a half cleaning up the bills. We had the corporation paying PVO and Balestrieri and I paying the other outside bills.

Q. Was there any dispute between Strategic Mineral Exploration Company or the partners of that and petitioner corporation?

A. Never.

Q. How was the amount determined that was the share of the Petitioner Corporation?

A. That was the money that was obtained from the Pacific [68] Vegetable Oil Corporation.

Q. Is this a copy, or is this the letter which was written to Pacific Vegetable Oil Company by Otto Sales Company with respect to the financing of this venture by Pacific Vegetable Oil Corporation? A. Yes, that is the true original.

Mr. Janin: I would like at this time to offer in evidence this letter.

Mr. Nyquist: Offer a copy.

Mr. Janin: I would like to offer a copy of this letter in evidence.

Mr. Nyquist: No objection.

The Court: Accepted in evidence.

The Clerk: Exhibit 5.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 5.)

(Testimony of Walter E. Otto.)

Mr. Janin: Your witness.

Cross Examination

By Mr. Nyquist:

Q. Mr. Otto, it says in the petition which your corporation filed in this court that Joe Balestrieri and W. E. Otto are the sole stockholders of the taxpayer corporation. Was that condition true throughout the taxable year 1943?

A. Well, there might have been a qualifying share, or maybe my wife owned some of the stock, or maybe Joe's wife. [69] Mr. Balestrieri and I owned half of that business. I mean, in the family somewhere there was—I can't answer that. Is that clear to you? I don't know exactly.

Q. I gather from your answer that in substance you and Mr. Balestrieri each owned half of the taxpayer corporation. Is that correct?

A. That's right. Where it lay, I can't give it to you.

Q. It further says in your petition that in order to keep the businesses separate it was decided by the officers of the taxpayer corporation to form a partnership to carry out the mining venture, and accordingly the partnership was formed on July 29, 1943. Is that statement correct?

A. Well, that is the day we recorded it. We made the partnership before we started on the deal, Hoff, Balestrieri and ourselves. We entered the agreement, but we had lots of things to handle in the interim, and by the time we got the leases and everything, then we recorded it. That is the date

(Testimony of Walter E. Otto.)

we recorded it, what you say.

Q. But the statement I read says that in order to keep the businesses separated it was decided by the officers of the taxpayer corporation to form a partnership to carry on the mining venture, and accordingly a partnership was formed. Now, aside from the date, is that statement correct?

A. I didn't—in the first place, this is the first time I have heard what you are talking about there, and I have [70] to think a second to give you—it's a long time ago.

Q. Let me rephrase that question. What is the business of the petitioner corporation?

A. Wholesale fish dealers.

Q. And this venture which you were becoming interested in was a chrome mining venture?

A. Yes.

Q. About as far separated from the fish business as one can imagine. It was for that reason that you decided to form a partnership to keep the business separated from the fish business, is that correct?

A. No. We had another identity in there, J. M. Hoff, and he couldn't be in the fish company because personalities didn't jibe. He was going to run the deal, he was the administrator of it, so we had to have it separate, that was all there was to that. It had to be a separate body. There were different identities. He had nothing to do with the fish corporation, Joe Balestrieri and Company.

Q. With respect to your individual financial position in about the middle of 1943, you have just

(Testimony of Walter E. Otto.)

testified that you owned 50 percent of the petitioner corporation. A. Yes, sir.

Q. Did you also own an interest in a fishing vessel?

A. I think we bought a boat that year or the preceding year, from California Packing Corporation. It was not greatly [71] paid for.

Q. I am referring now to Petitioner's Exhibit 5, the letter to the Pacific Vegetable Oil Corporation, signed by the Otto Sales Company.

A. That was my company. See, I had my own business.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

By Mr. Nyquist:

Q. Referring again to Petitioner's Exhibit 5, the letter to the Pacific Vegetable Oil Corporation, signed by the Otto Sales Company, by W. E. Otto, what was the relationship of the Otto Sales Company to this transaction?

A. Well, I wrote that letter. That has nothing to do with it. I wrote it on that letter on behalf of the partnership, that is all. I don't know whether they had a letterhead at that time or not.

Q. In other words, although this letter is signed Otto Sales Company, it was written on behalf of the Strategic Mineral Exploration partnership?

A. Yes.

Q. I read to you the postscript from that letter:

(Testimony of Walter E. Otto.)

"I neglected to insert above that should our operations be so unfortunate as to result in a loss no part of this loss will be for your account, but will be taken care of in its [72] entirety by J. M. Hoff, Joe Balestrieri and W. E. Otto."

A. Yes, sir.

Q. After receipt of that letter by Mr. Rocca, the president of the Pacific Vegetable Oil Corporation, did he then indicate that the individual guarantee of J. M. Hoff, Joe Balestrieri and W. E. Otto were not sufficient?

A. He was not interested.

The Court: I understand that has been taken care of by stipulation.

Mr. Nyquist: I wanted to get the sequence. This is dated July 23. I just want to establish the sequence of events there, your Honor.

The Court: Go ahead.

By Mr. Nyquist:

Q. Then it was subsequent to the receipt of this letter that Mr. Rocca insisted upon the Joe Balestrieri Company guaranteeing to protect him in the event of loss?

A. My recollection at the time was that I took that down in my automobile to him and he kind of laughed at me when he saw that guarantee there, and he told me what his ideas were. I immediately carried that back to Mr. Balestrieri to see if that was acceptable, because it was a new feature to the entire transaction.

Q. Then the letter of July 24, marked Peti-

(Testimony of Walter E. Otto.)

tioner's Exhibit 1, which was the offer by the Strategic Mineral Exploration [73] Company to the Joe Balestrieri Company was written subsequent to Mr. Rocca's refusal to—

A. That's right.

Q. Insistence upon the guarantee by Joe Balestrieri Company? A. Yes, sir.

Q. I read to you the paragraph in there again about the guarantee:

"The consideration for this offer is that your corporation agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Corporation on our chrome milling venture."

A. Yes, sir, that is what it says.

Q. In other words, that guarantee is for the protection of the Pacific Vegetable Oil Corporation, is that correct?

A. Yes, sir. The fish company agreed to absorb any loss that might occur. We in turn thought we were doing the fish company a big favor giving them 50 percent.

Q. My question was—will you repeat my last question?

(The question was read by the Reporter.)

Mr. Janin: I think, if your Honor please, that calls very much for the conclusion of the witness, and that the agreements speak for themselves in that respect.

The Court: Isn't that position a little inconsistent with your questioning of the witness on

(Testimony of Walter E. Otto.)

direct examination with [74] regard to the meaning of that phrase?

Mr. Janin: I asked as to the meaning of the phrase. Now counsel is asking as to the effect of the phrase.

Mr. Nyquist: I am asking as to the purpose of the phrase.

The Court: I will construe the question as meaning to inquire from this witness what this witness intended the purpose to be, or what this witness and other parties to it intended the purpose to be.

The Witness: The intent, the purpose, if it be so unfortunate to have a loss, the fish company which had assets, would absorb those losses.

By Mr. Nyquist:

Q. Was it your purpose in entering into this agreement to protect the creditor, the Pacific Vegetable Oil Corporation, from loss?

A. That was Pacific Vegetable Oil's intent. Otherwise we couldn't have the money.

Q. Then was it because Pacific Vegetable Oil insisted on being protected in the event of loss that you entered into this agreement?

A. Well, they laid down the stipulation. That is all there was, we could either go that way, or we couldn't have the money.

Q. Then I gather from your answers to these questions [75] that it was your intention, at least in writing this letter containing the offer and in acting as a director of the Balestrieri Company in

(Testimony of Walter E. Otto.)

accepting the offer, to protect the Pacific Vegetable Oil Corporation from loss, so that they would enter and extend the credit to you. Is that correct?

A. Well, it's slightly altered because in order to interest the corporation, Mr. Balestrieri, to get into the corporation, we had to give them fifty percent of what it might make, of what we'd earn.

Q. In other words—

A. "Yes and no" is the answer to that. I am trying to be fair to counsel.

Mr. Janin: I will stipulate that was a part of the purpose, counsel, certainly part of the purpose.

By Mr. Nyquist:

Q. Referring again to the language, "Any losses or deficits that may occur on money borrowed from the Pacific Vegetable Oil Corporation," will you explain just how, in your opinion, it is possible for a partnership to sustain a loss or a deficit on moneys which it borrows from some outsider.

A. Well, that is very easy. Use the borrowed money to perform the operation. If the operation should show a loss as a definite loss, that is very simple.

Q. There is a loss?

A. Instead of selling stock or getting people to come in, [76] you borrow money for a certain venture. You understand the Pacific Vegetable Oil was to receive twenty-five percent of any earnings

(Testimony of Walter E. Otto.)

that might have been made, but were not responsible for any losses.

Q. Let me explain my question again. In the case of money owed to a partnership, for example, I believe we can all understand how a partnership could sustain a loss in the event that the party who owed it to the partnership defaulted. But how can a partnership in your opinion sustain a loss on money which it owes to somebody else?

A. Well, very easily. That money was used to operate a venture. That is what the venture was, and what that borrowed money actually lost itself and additional money—

The Court: Your idea is that if you hadn't been able to borrow from Pacific Vegetable you wouldn't have gone on with it and you wouldn't have lost any money. Is that it?

The Witness: That's right.

By Mr. Nyquist:

Q. You have testified that you and Mr. Balestrieri were each fifty percent owners of the Joe Balestrieri and Company.

A. That's right, yes.

Q. Just what was your purpose in wanting to shift any loss that might occur from the partnership to the corporation?

Mr. Janin: If your Honor please, I object to the word "shift" in there. I think that definitely calls for the [77] conclusion of the witness. If he will rephrase his question I have no objection to the explanation of the purpose here drawn out.

(Testimony of Walter E. Otto.)

Mr. Nyquist: If it suits petitioner's counsel better I will rephrase the question.

By Mr. Nyquist:

Q. What was your purpose in wanting the Petitioner corporation to assume any losses which would otherwise have fallen on the partnership?

A. Well, that started with Pacific Vegetable Oil's order to us. It had to be that way.

Q. In other words, the purpose was to protect the creditor so that he would extend the credit. Is that true?

A. I can't answer what was in Mr. Rocca's mind, but unless our corporation was a party to that, we could not proceed.

Q. At the time this contract was made, did you discuss with anyone the effect of the contract upon your tax liability as individuals, or upon the corporation's tax liabilities?

A. Never thought of it at that time.

Q. When was the first time that that aspect of the problem came to your attention?

A. When Mr. Balestrieri called me on the phone and told me that somebody was down there from the government and didn't think they were going to allow it. [78]

Q. Was that the first time that the full significance of this, that you realized the full significance of this contract?

A. Yes, sir.

Q. And that you realized that it was for your protection as well as Pacific Vegetable Oil?

(Testimony of Walter E. Otto.)

A. Well, I never thought much about my protection there, because we entered this, as I tell you, I was pretty thin financially, and any place to try to make some money, that is all.

Q. With respect to this credit that Pacific Vegetable Oil extended to the partnership, throughout the period of a few weeks that the partnership was operating, were payments made from time to time to the Pacific Vegetable Oil as well as credit being extended?

A. That I don't know. I mean, I would imagine if we got a carload of chrome milled and there was any surplus money left after the payroll was made, it would certainly take it down to Pacific Vegetable Oil. See, the only returns we received was the concentrate chrome we were selling to the government, and as we'd ship a car we'd have some proceeds. Now, I don't know where the overlap came.

Q. Will you explain to us, please, under your interpretation of this contract, just how you understand that the extent of the liability of Joe Balestrieri Company is to be [79] determined.

A. Well, we gave them 50 percent interest for agreeing to stand behind the deal for us, and there was a loss of \$22,000 on that end of the venture. It was up to them to make that up.

Q. Let us get to that portion of your answer in which you stated there was a loss of \$22,000. Will you explain just how that loss of \$22,000 was, in your opinion, to be determined?

A. Well, that was just figures of what we spent for ore and what we received in concentrates at

(Testimony of Walter E. Otto.)

the mill. That is what we got back, we were just that much short on the operation of the chrome mill.

Q. Was that the amount that was due to the Pacific Vegetable Oil Corporation on the date that you decided to terminate the venture?

A. Yes, sir, yes.

Q. In other words, if the venture had been terminated a few weeks earlier or a few weeks later, the amount would undoubtedly have been different?

A. A few weeks earlier would have been lots less. We didn't have sense enough to terminate it quick enough, let's put it that way.

Q. Or if Pacific Vegetable Oil had extended a little more credit—

A. It would have been more. [80]

Q. It would have been more?

A. That's right.

Q. In other words, the amount of the loss to be absorbed by the Balestrieri Company was dependent upon the amount shown in the account between the partnership and the Pacific Vegetable Oil Corporation?

A. The money was loaned to the partnership, and then in turn was guaranteed by Balestrieri and Company.

Q. Did the Pacific Vegetable Oil Corporation make any demand against you personally for payment of this money?

A. No. They were after the fact that—

(Testimony of Walter E. Otto.)

Q. Your "no" is sufficient.

Was the Joe Balestrieri and Company active investing or making investments or participating in ventures outside of the fish business?

A. No, not generally.

Q. Did the Joe Balestrieri Company have in 1943 sufficient surplus or unneeded working capital to be able to freely participate in ventures outside of its regular fishing business?

A. They could take on limited ventures.

Q. Would they have participated in a venture such as a chrome mining venture like this with an outsider?

A. I can't answer that. I mean, it depends what the proposition might be, how weak you are at the conversation.

Q. Wasn't one of the purposes of the corporation in [81] entering into this guarantee the accommodation of you and Mr. Balestrieri?

A. Well, first Hoff had as big interest as we had in the deal, and the next was we, the three partners, thought we were letting the fish company in for a very lucrative earning, not a loss.

Mr. Nyquist: Move that be stricken as not responsive to the question.

Mr. Janin: I think it is responsive to the question.

The Court: I will deny the motion.

Mr. Nyquist: I will repeat the question.

By Mr. Nyquist:

(Testimony of Walter E. Otto.)

Q. Was not one of the purposes of the corporation in entering into this agreement to accommodate you and Mr. *Otto* by enabling you to get credit for your partnership which you otherwise would not be able to get?

A. One of the purposes, yes, was the accommodation; but in the main, for the corporation, was the earning that was possible, that we expected to make.

Q. Do you recall when the amount due to the Pacific Vegetable Oil Corporation was paid?

A. I think it was paid all during the year '44. I think the corporation gave Pacific Vegetable a definite note for that when we set the amount up. That is my recollection, and I think we could possibly get that note. [82]

Mr. Nyquist: I would like to state at this point that the taxpayer corporation's return states that its books are kept on a cash basis. Now, I presume petitioner's counsel who just came into the case is probably not aware of that, but I will ask him whether that is true.

Mr. Janin: It is true that the return states that. I don't know whether or not the fact is true, whether the books are kept on cash or accrual basis or whether the return was prepared on cash or accrual basis. But it is true that the return states it was prepared on a cash basis.

The Court: It will be assumed, I should think, that they were kept on a cash basis.

Any other questions?

Mr. Nyquist: No further questions.

The Court: Any redirect?

Mr. Janin: No redirect, your Honor.

The Court: That is all.

(Witness excused.)

The Court: Do you have another witness?

Mr. Janin: Yes. I would like to call Mr. Balestrieri.

Whereupon,

JOSEPH BALESTRIERI,

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination [83]

The Clerk: State your name and address.

The Witness: Joseph Balestrieri, 44 Avila St.

By Mr. Janin:

Q. Mr. Balestrieri, when did you first learn of this chrome milling and mining venture?

A. 1943.

Q. From whom did you learn about it?

A. Mr. Hoff and Mr. Otto.

Q. Was there any discussion at your Board of Directors meeting on July 26th, 1943, when the proposal of Strategic Mineral Exploration Company was presented to the petitioner corporation?

A. There was.

Q. Can you tell us the general purport of that discussion?

A. They brought me a proposition in to operate this mill. They were out to borrow some money,

(Testimony of Joseph Balestrieri.)

and the way they borrow the money would have to have a guarantee from Joe Balestrieri and Company.

I asked the question what will Joe Balestrieri get in return to guarantee this loan. The answer to me, they would give fifty percent of the profit, if any profits were made.

When they made the proposition to me I took the deal on it, and I went on record, borrowed direct, guaranteed the payment any money borrowed for operating the mill, if there was any [84] loss.

Q. When the venture wound up some 90 days later, what did the petitioner corporation do with respect to the obligation of Strategic Minerals Company to Pacific Vegetable Oil Corporation?

A. Well, we had about \$39,000 loss that come in this venture. \$22,000 is to the Pacific Vegetable Oil Company, and the balance was owed to other dealers. So Balestrieri guaranteed to absorb any loss for the Pacific Vegetable Corporation, so Balestrieri Company, he took the loss on themselves, and the loss was took on by W. E. Otto and myself personally. Hoff, he didn't want to have any part of it. So we paid the balance of the bill between the two of us. And I am telling you it was no fun.

Q. Did the petitioner corporation give anything to Pacific Vegetable Oil Company to assure Pacific Vegetable Oil Company of the recognition by petitioner of this obligation to it?

(Testimony of Joseph Balestrieri.)

A. We gave them a note, showed that we owed that much money to them.

The Court: When did you give it to them?

The Witness: No—November, I think it was, November I think we gave them a note in November. I don't recall the date.

The Court: November '43? [85]

The Witness: '43, yes.

Mr. Janin: I have no further questions.

The Court: Proceed.

Cross Examination

By Mr. Nyquist:

Q. Showing you Petitioner's Exhibit 2, the minutes of the meeting of the Board of Directors of the Joe Balestrieri Company on July 26, 1943, this copy shows that it was approved by you as President. Did you sign the original as President approving the minutes? A. I did.

Q. Did you read before you signed?

A. I read now, often.

Q. It plainly states therein that the proposal was to participate in one-fourth of the earnings of the chrome mining venture.

A. That is correct. I noticed that yesterday.

Q. That is, this copy says one-fourth, the original minutes say one-fourth.

A. The original minutes say one-fourth, and the agreement meant fifty percent. But I didn't notice until yesterday when I read the minutes.

Q. In other words, at that time you really

(Testimony of Joseph Balestrieri.)

weren't particularly concerned whether it was a fourth or one-half; is that correct? [86]

A. Oh, yes, it was that. I understand it was fifty percent.

Q. You understood it was fifty percent?

A. Definitely.

Q. But that wasn't a matter of sufficient importance to bring itself to your attention when you read and approved these minutes; is that correct?

A. Well, I tell you when they write these minutes I very seldom look at it. I tell you the reason why I don't look at it, because my daughter happens to be my secretary and I don't pay much attention to the minutes. I take it for granted whatever she writes is all right with me.

Q. Will you please state again your understanding of exactly what the corporation was guaranteeing to do under this agreement?

A. We were supposed to guarantee any money was borrowed from the PVO, Pacific Vegetable Oil, Incorporated.

Q. You were to guarantee they would be paid back?

A. They'd be paid back, definitely. In return we were supposed to receive fifty percent of the profit of this venture which would make me rich overnight.

Q. You owned half of the stock of the Balestrieri Company? A. I do.

Q. You did throughout the year 1943?

(Testimony of Joseph Balestrieri.)

A. I did. [87]

Mr. Nyquist: No further questions.

The Court: Any redirect?

Mr. Janin: Yes, just a couple of questions, your Honor, please.

Redirect Examination

By Mr. Janin:

Q. As far as you know, were any of the letters involved in this proceeding drawn by an attorney; the minutes were not drawn by an attorney, were they? A. No.

Q. Was the acceptance of the petitioner corporation of the offer of Strategic Mineral Exploration Company drawn by an attorney?

A. I don't quite follow you. Repeat that.

The Court: Did you get a lawyer to write any of these papers for you?

The Witness: No, not that I know of, no.

By Mr. Janin:

Q. What was your understanding as to what would happen under these agreements in the event that Strategic Mineral Exploration Company sustained a loss on its operations of the milling venture, and therefore, for that reason was unable to pay back to Pacific Vegetable Oil Company the amount of the loan borrowed for that purpose? What was your understanding as to what would happen there as between the partnership and [88] your own corporation.

A. Well, my understanding was that we are supposed to guarantee Pacific Vegetable Oil Com-

(Testimony of Joseph Balestrieri.)

pany if there was a loss in the mill. They are the only bill we are supposed to guarantee from the corporation. No other bills.

Q. Assume that the partners in that concern had individually been financially solvent so that they could have readily paid from other assets.

Mr. Nyquist: Objection, your Honor. This method of phrasing the question, assuming so many things, takes on the air of a leading question.

Mr. Janin: Your Honor, this is deliberately a leading question because it is cross examination on a matter I did not go into on direct examination.

The Court: I will overrule the objection. Go ahead.

By Mr. Janin:

Q. Assuming that the partnership had been fully able to pay the amount of the loan, or the partnership itself had lost money and didn't have any assets, what was your understanding as to who should pay the obligation to Pacific Vegetable Oil Corporation as between the partners and the petitioner corporation?

A. Well, understanding it was the corporation would stand for the loss of the money borrowed from Pacific Vegetable Oil only. [89]

The Court: Any further questions?

Mr. Janin: I have no further questions.

Mr. Nyquist: No further questions.

The Court: That is all, sir.

(Witness excused.)

The Court: I think I should state to counsel in order that there be no misunderstanding as to proof that I will take it for the purposes of this case that the petitioner corporation is on a cash basis of accounting, and that it executed its note to the Pacific Vegetable Oil Company in November 1943 calling for the payment of \$22,292.37, and that payments were made on that obligation in 1944 in weekly amounts, and the payments were not begun until 1944 and were not completed until 1944.

Mr. Janin: Certainly we have not proved any payments in 1943, your Honor. Whether there were any, I don't know, but if so, they were trivial.

Mr. Nyquist: With respect to that note, petitioner's counsel has been unable to obtain a copy of it, but I understand that the note was given—my records indicate there was a note given, and I will so stipulate.

The Court: Petitioner rests?

Mr. Janin: Petitioner rests, your Honor, except I would like to have leave to amend the petition in this case to conform to the proof adduced here this morning. I don't think [90] that the petition accurately sets forth the controversy, and I think that it would be a help to have the petition rephrased in part.

The Court: Well, leave will be granted, and leave will be granted to the Respondent to file appropriate answer.

As I understand it, it is merely for the purpose of perhaps better stating the petitioner's position, but without any change in the position. Is that correct?

Mr. Janin: Without any substantial change. There is one change which might be regarded as being somewhat substantial, and that is in the petition I believe that it is alleged that the corporation was to receive twenty-five percent of the profits of the venture, whereas, the proof as adduced this morning, I think rather clearly shows that it was fifty percent.

The Court: Leave will be granted. You don't have the amendment at present?

Mr. Janin: We do not have it prepared yet.

The Court: Leave granted. You can file it within fifteen days, I should think.

Respondent will be given fifteen days to file an answer, if he cares to.

Mr. Nyquist: If that is the only type of amendment respondent would have no objection to the amendment that petitioner's counsel has just suggested.

The Court: The understanding is the amendment will [91] be made only for the purpose of conforming the pleadings to the proof.

The briefs will be filed pursuant to the rules.

Mr. Janin: That is satisfactory.

Mr. Nyquist: Your Honor, on the Pacific Coast here we have a problem of mail. We frequently don't receive a brief until a week after it is filed.

We have to allow a week to get it back, through brief review and to the Court.

The Court: Let's add ten days to each period. Instead of 45 days, 55 days; instead of 15 days for the reply brief, 25 days.

Mr. Nyquist: Thank you, your Honor.

(Whereupon, at 10:50 a.m., the hearing in the above-entitled matter was closed.) [92]

PETITIONER'S EXHIBIT No. 4

(Copy)

ARTICLES OF CO-PARTNERSHIP

This Agreement made on this First day of July, 1943, by and between John M. Hoff, hereafter called First Party, and Joe Balestrieri, hereafter called Second Party, and W. E. Otto, hereafter called Third Party,

Witnesseth:

That the parties hereto are desirous of forming a co-partnership, and do hereby form a co-partnership wherein each of the parties hereto, shall have equal interests. The said partnership shall operate under the name of Strategic Minerals Exploration Co.

That the said partnership will engage in the business of prospecting for, buying and selling mines and interests in mines, metals, strategic materials of all kinds and characters, and mining machinery and equipment, and to perform services in the nature of mining engineering.

First party hereto, will devote his full time and attention to the carrying on and conducting of the aforesaid operation, and to that end, will travel to any point or points necessary to transact and develop any properties prospect of acquisition or acquired.

The Second and Third parties hereto, will provide First party with an office in San Francisco, and with telephone and other services necessary or convenient for the carrying out of said operations.

Second and Third parties hereto, will provide First party with all necessary traveling expense, and the sum of Fifty Dollars (\$50.00) [93] per week, for his maintenance for a period of six (6) months from the execution hereof, and First party will use and employ his automobile in connection with the said venture.

Any and all profits from the said venture, will be shared equally between the parties hereto after first reimbursing Second and Third parties for any sums advanced to First party for expenses or maintenance.

The First party shall not make nor enter into any agreement to purchase or sell, or any agreement binding upon the partners, without having first obtained the consent and approval of Third party.

The parties hereto shall keep and maintain good and sufficient books of account, from which at all

times the condition of the said partnership may be ascertained, and which said books of account shall at all times be open to and available to any or all of the parties hereto.

In Witness Whereof, the parties hereto have caused these presents to be executed this First day of July, 1943.

/s/ J. M. HOFF,

/s/ W. E. OTTO,

/s/ JOSEPH BALESTRIERI. [94]

(Copy)

CERTIFICATE OF CO-PARTNERS TRANS-
ACTING BUSINESS UNDER FICTITIOUS
NAME

Know All Men By These Presents:

That we, the undersigned, John M. Hoff, Joe Balestrieri, and W. E. Otto, do hereby certify that we are co-partners transacting business in the State of California, under the fictitious name and style of Strategic Minerals Exploration Co., and that the principal place of business of said co-partnership, is situated at No. 255 California Street, in the City and County of San Francisco, State of California, and that the names in full of all the members of said co-partnership and their respective residences, are as follows: John M. Hoff, 1944 - 8th Avenue, Oakland, California; Joe Balestrieri, 44 Avila Street, San Francisco, Calif.; W. E. Otto, 90 Ramona Street, Piedmont, Calif.

In Witness Whereof, we have hereunto set our hands this first day of July, 1943.

/s/ J. M. HOFF,
/s/ JOE BALESTRIERI,
/s/ W. E. OTTO. [95]

(Copy)

State of California,
City and County of San Francisco—ss.

On this day of July, 1943, before me
....., a Notary Public in and for the City
and County of San Francisco, State of California,
personally appeared John M. Hoff, Joe Balestrieri
and W. E. Otto, known to me to be the persons
whose names are subscribed to the foregoing instru-
ment, and they acknowledged to me that they
executed the same.

In Witness Whereof, I have hereunto set my
hand and affixed my official seal at my office in
the City and County of San Francisco, State of
California, the day and year in this certificate first
above written.

.....,

Notary Public, in and for the City and County of
San Francisco, State of California. [96]

* * * *

QUESTIONS

1. Date of incorporation: 2/15/1941.
2. State or country: Calif.
3. State collector's office where the corporation's return for the preceding year was filed: S. F.
4. Corporation's books are in care of Main Office, 432 Clay St., San Francisco.

* * * *

6. Did the corporation during the taxable year have any Government contracts or subcontracts? (Answer "yes" or "no"): No. If answer is "yes," state the approximate aggregate gross dollar amount billed during the taxable year under all such contracts and/or subcontracts. (See Instruction G-(3).): \$ No.

7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No.

8. Is this a consolidated return? No.

9. If this is not a consolidated return: (a) did you own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? No.

10. Is this return made on the basis of cash receipts and disbursements? Yes.

11. Did the corporation at any time during its taxable year have in its employ more than eight individuals? (Answer "yes" or "no"): Yes. If answer is "yes," has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? (Answer "yes" or "no"): No.

12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower: Cost.

13. Did the corporation make a return of information on Forms 1096 and 1099 or Forms V-2 and W-2 for the calendar year 1943 (see Instruction G-(1))?
Yes.

14. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no"):
No.

[99]

* * * *

[100]

JOE BALESTRIERI & CO.

1943

ITEM 29—SCHEDULE D—OTHER DEDUCTIONS:

Wharf Expenses	\$ 2,728.76
Advertising	124.65
Automobile Expenses	3,047.87
Communications	2,369.01
Freight	3,363.75
Insurance	2,612.11
Office Supplies	856.13
Utilities	2,686.78
Miscellaneous	818.90
Travel Expenses	1,388.09
Entertainment	1,117.40
Commissions	5,430.38
Legal-Auditing	1,426.25

 \$27,970.08

SCHEDULE F—COMPENSATION OF OFFICERS:

Joe Balestrieri, 44 Avila, President. Full time.....	\$ 4,200.00
Walter E. Otto, 90 Ramona Ave., Piedmont, Vice-Pres. and Secretary. Part time	\$ 2,100.00

 \$ 6,300.00

SCHEDULE H—Taxes:

Social Sec. & Unempl.	\$1,218.76	
Automobile Taxes	153.90	
Capitol Stock	9.29	
City of S. F.	756.23	
State Franchise	528.29	
Declared Value E. P. Tax.....	625.00	\$ 3,291.47
[In longhand]: Corp stock OK		

SCHEDULE J—DEPRECIATION:

Automobile	\$1,252.55	
Furniture and Fixtures.....	1,044.11	
Building	732.02	\$ 3,028.68

SCHEDULE L—[Illegible]

Assets	Dec. 31, 1942		Dec. 31, 1943	
Current Assets				
Cash on Hand.....	\$ 75.00		\$ 100.00	
Bank Account	1,844.69		1,001.29	
Accounts Receivable	18,490.81		27,726.71	
Bering Sea Codfish Co.....	11,100.00	\$31,510.50	8,461.21	\$ 37,289.21
Merchandise Inventory	\$31,273.69		\$44,740.22	
Supplies	1,700.05	\$32,973.74	5,619.05	\$ 50,359.27
Capital Assets				
Automobiles	\$ 5,277.23		\$ 6,094.73	
Furniture & Fixtures.....	3,546.08		3,824.63	
Equipment & Machinery....	4,498.10		5,812.26	
Building & Improvements..	14,513.12		15,050.42	
	\$27,834.53		\$30,782.04	
Less: Depreciation	3,390.74	\$24,443.79	6,419.42	\$ 24,362.62
or Bragg Investment.....		1,250.00		
[In longhand]: Improvmts.				
Deferred Payments:				
Insurance Prepaid	907.29		1,606.32	
Rent Prepaid	346.25	1,253.54	346.25	1,952.57
		\$91,431.57		\$113,963.67

SCHEDULE L—(Continued)

	Dec. 31, 1942		Dec. 31, 1943	
Liabilities & Net Worth				
Accounts Payable	\$25,388.31		\$26,179.38	
Pacific Vegetable Oil.....	30,364.00		49,161.38	
Notes Payable	8,623.04		4,515.29	
Taxes Payable	568.12	\$64,943.47	570.13	\$ 80,426.00
Mortgages		7,113.41		6,249.50
Capital & Surplus				
Capital Stock				
Authorized	\$25,000.00		\$25,000.00	
Unissued	17,570.00		17,570.00	
Paid in	\$ 7,430.00		\$ 7,430.00	
Paid in Surplus	5,772.55		5,772.55	
Earned Surplus & Un-				
divided Profits	6,172.14	19,374.69	14,085.38	27,287.90
		\$91,431.57		\$113,963.00

SCHEDULE M—RECONCILIATION:

3	Federal Income Tax.....	\$ 946.76	13	\$ 5,401.50
11	Earned Surplus.....	14,085.38	14	9,630.50
12	Total.....	\$15,032.14		\$ 15,032.14

RESPONDENT'S EXHIBIT B
(Admitted in Evidence Mar. 25, 1948)

Form 1121—Treasury Department, Internal Revenue Service. 1943

[Stamp]: Received March 15, 1944, Collector of Int. Rev., First Dist. Calif.

United States
Corporation Excess Profits Tax Return
For Calendar Year 1943

Name and address: Joe Balestrieri & Co., 432 Clay Street, San Francisco, California.

Business group serial number entered on page 1, Form 1120: 131.

Excess Profits Tax Computation

Item and Instruction No.	Column 2	
	Invested Capital	Credit Method
1. Excess profits net income (line 16, Schedule A)....	\$ 10,781.58	
2. Specific exemption	5,000.00	
3. * * * *		
4. Excess profits credit—based on invested capital (line 41, Schedule C).....	4,454.77	
5. Unused excess profits credit adjustment (attached schedule)	2,424.56	
6. Total of lines 2 to 5.....	\$ 11,839.33	
7. Difference between item 1 and item 6.....	\$ (1,057.75)	
* * * *		
24. Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)....	\$	None
* * * *		

We, the undersigned, president (or vice-president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompany schedules and statements) has been examined by him and is to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ JOSEPH BALESTRIERI,

President.

/s/ W. E. OTTO,

Vice-President and Sec'y.

Subscribed and sworn to before me this 6th day of March, 1944.

(Seal) /s/ JOSEPH A. TORASSA,

Notary Public, in and for the City and County of San Francisco, State of California.

I swear (or affirm) that I prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability

of the person for whom this return has been prepared of which I have any knowledge.

/s/ JOHN L. FLYNN,

1211 Russ Bldg.,

San Francisco, California.

(Signature of person preparing the return)

Subscribed and sworn to before me this 6th day of March, 1944.

(Seal) /s/ JOSEPH A. TORASSA,

Notary Public, in and for the City and County of San Francisco, State of California. [103]

* * * *

Schedule A.—Excess Profits Net Income Computation

Line No.	Column 2 Invested Capital Credit Method
1. Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 37, page 1, Form 1120).....	\$ 9,630.36
* * * *	
5. 50 percent of interest on borrowed capital.....	1,151.22
* * * *	
7. Total of lines 1 to 6.....	\$10,781.58
* * * *	
18. Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	\$10,781.58
* * * *	

Schedule C.—Excess Profits Credit—Based on Invested Capital

Equity Invested Capital at the Beginning of the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

Line No.

1. Money paid in for stock, or as paid-in surplus, or as a contribution to capital).....	\$13,202.55
* * * *	
4. (a) Accumulated earnings and profits....	\$14,531.95
* * * *	
(d) Accumulated earnings and profits (item 4 (a) as adjusted by item 4 (b) and (c).....	14,531.98
5. 25 percent of new capital paid in during a taxable year beginning after December 31, 1940.....	1,443.13
* * * *	
8. Total of lines 1 to 7.....	\$29,177.63
* * * *	
14. Equity invested capital at beginning of taxable year (line 8 minus line 13).....	\$29,177.63
Average Addition to Equity Capital During the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)	
* * * *	
22. Total of lines 14 to 21	\$29,177.63
* * * *	
28. Average equity invested capital (line 22 minus line 27)	\$29,177.63
29. Average borrowed capital, attach sched.)	\$53,013.34
30. Average borrowed invested capital (60 per cent of line 29)	26,506.67
31. Average invested capital (line 28 plus line 30).....	\$55,684.30
* * * *	
36. Invested capital (line 31, minus line 35).....	\$55,684.60
37. Portion of line 36 (not in excess of \$5,000,000) ; and credit at 8 percent	\$ 4,454.77
* * * *	
41. Excess profits credit—based on invested capital (total of lines 37 to 40).....	\$ 4,454.77

[Endorsed]: T.C.U.S. Filed April 2, 1948. [106]

The Tax Court of the United States

Docket No. 12834

[Title of Cause.]

Louis Janin, Esq., for the petitioner.

C. W. Nyquist, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT
AND OPINION

Respondent has determined a deficiency in petitioner's excess profits tax liability for the year 1943 in the sum of \$25,021.71. The only error alleged in the amended petition is as follows: "The Commissioner erred in disallowing the loss of \$22,-229.37, or any part thereof, resulting from a business venture between petitioner and Strategic Mineral Exploration Co., a partnership." Respondent has disallowed this alleged loss as not being "an allowable deduction under section 23 of the Internal Revenue Code." [107]

FINDINGS OF FACT

Petitioner is a corporation organized in 1941 under the laws of the State of California. Its business is that of a wholesale dealer in fish. Its corporation income and declared value excess profits tax and corporation excess profits tax returns for the year 1943 were filed, on a cash basis, with the

collector of internal revenue for the first district of California.

Petitioner's capital stock was entirely owned by Joe Balestrieri and W. E. Otto, or by members of their immediate family. Balestrieri was president of petitioner and Otto was vice-president. Both were members of petitioner's Board of Directors.

In the early summer of 1943, one J. M. Hoff, a mining engineer, approached Otto, in his individual capacity, with a proposition for the mining and milling of chrome ore. Thereafter, Otto introduced Hoff to Balestrieri. In July 1943, after several conversations and after each had convinced himself that very large profits would be derived from the mining and milling of this ore, the three individuals named (Hoff as party of the first part, Balestrieri as party of the second part, and Otto as party of the third part) executed Articles of Co-partnership, which are incorporated herein by reference, and which provide, in substance, as follows: Each party would have an equal interest in the partnership, which would operate under the name of Strategic Mineral Exploration Co. and should engage "in the business of prospecting for, buying and selling mines and interests in mines, metals, strategic materials of all kinds and characters, and mining machinery and equipment, and to perform services in the nature of mining engineering." Hoff was to devote his full time and attention to the carrying on of the business of the partnership. Balestrieri and Otto were to [108] provide an office and provide Hoff with traveling

expenses and money with which to maintain himself for a period of six months. The profits were to be shared equally between the partners, after reimbursing Balestrieri and Otto for any sums advanced. Shortly thereafter, a "Certificate of Co-partners Transacting Business Under Fictitious Name" was filed with the county clerk in San Francisco, certifying that the three above-named individuals were "all the members of said co-partnership."

In order to secure finances for the partnership, Otto, on behalf of the partnership, approached the Pacific Vegetable Oil Corporation, with which concern the petitioner and Balestrieri and Otto had had previous business dealings. After a conversation with one of the officers of that corporation, Otto, on behalf of the partnership wrote to the Pacific Vegetable Oil Corporation the following letter:

July 23, 1943

Pacific Vegetable Oil Corp.
62 Townsend Street
San Francisco, California
Attention: Mr. B. T. Rocca

Dear Mr. Rocca:

Subject: Financing chrome ore through plant
of the Montrose Mine & Milling Company—
Castella

This is to confirm conversation wherein you agreed to finance the purchase of Chrome ore and

milling and the discounting of the invoices upon the following basis: Funds are to be provided for the purchase of ore, about as follows:

1. Chrome ore—Expected Avg. price: \$12.00 per ton 2240 lbs.

2. Milling ore: \$2.50 per ton 2240 lbs.

3. Freight on Concentrates to Sacramento: \$4.00 per ton 2240 lbs.

From the above, and based on 100 tons a day, a 10 day run will require approximately \$15,000.00; if 200 tons, and this is expected within 60 days, it will require \$30,000.00.

A Partnership, Strategic Minerals Exploration Co., consisting of J. M. Hoff, W. E. Otto and J. Balestrieri, will buy this ore. It will be milled in the mill of the Montrose Mine and Milling Company. [109]

The concentrated chrome will then be shipped to the Metals Reserve stock pile at Sacramento on a straight bill of lading which will be consigned to us. The railroad company will furnish weight tag; Abbot Hanks will sample car at Sacramento and furnish us with assay certificate; Montrose Mine & Milling Co. will prepare invoices and assign invoices to Strategic Minerals Exploration Co., who in turn will assign invoices to you. When the invoices have been assigned to you, procedure is as follows. We first figure out what you have advanced against the car, namely:

COST OF ORE

Milling

Freight on concentrate

The above costs are added and the difference between the above costs and the invoice value you then advance 80% to the Montrose Mine & Milling Co. This we do until the sum of \$80,000.00 has been paid. The remaining 20%, one-fourth goes to you for financing; one-fourth to Strategic Minerals Exploration Co. and one-half held by you to liquidate Otto Sales Company accounts. When Otto Sales Co. account has been paid in full, then this one-half share will be paid to Strategic Minerals Exploration Company. When the sum of \$80,000.00 has been paid to Montrose Mine & Milling Company, Strategic Minerals Exploration Co. will then participate in all earnings on a 50-50 basis.

As long as you are financing the deal, you will receive 25% of our net earnings—never any part of the mill owners' share of earnings.

When it is no longer necessary for you to finance the milling operations, you will participate to the extent of 10% of our share of the earnings for the duration—our share being either 20% or 50%.

We will be very pleased to issue you notes for all sums of money advanced for ore or against invoices.

The write [sic] has made an extensive investigation of the mill operation, seen the plant running; and under extremely competent mill operating

engineers it is turning out a very fine product on a profitable basis.

The writer has also personally investigated the financial setup of the Montrose Mine & Milling Company and it is in perfect shape. Our setup is such that as soon as we buy the ore and own it and pay the mill for milling it there is no possible prospect or hazard of any unknown thrid [sic] party entering the scene and causing any trouble. Considerable time, thought and study was given this feature and the entire operation set up to eliminate any possible unknown trouble or complication.

The writer at the start of the deal will go to Dunsmuir and personally see to it that the mine producers of ore are paid, and an account will be kept in the local bank of Dunsmuir in the name of S. M. E. Co. and check will only be issued when either signed by W. E. Otto or B. T. Rocca.

We are very appreciative of your agreeing to handle the financing of the above transaction.

Yours very truly,

OTTO SALES COMPANY,

/s/ W. E. OTTO.

[110]

WEO:MW

P.S. I neglected to insert above, that should our operations be so unfortunate as to result in a loss, no part of this loss will be for your account, but will be taken care of in its entirety by J. M. Hoff, Joe Balestrieri and W. E. Otto.

The Pacific Vegetable Oil Corporation indicated that it would agree to the proposition outlined by Otto provided petitioner's Board of Directors would agree to "underwrite" any loss which the Pacific Vegetable Oil Corporation might sustain as a result of its discounting any invoices of the partnership. Thereupon, Otto, on behalf of the partnership, wrote to petitioner the following letter:

Strategic Mineral Exploration Co.

Mines and Mining

255 California Street

Garfield 6236

San Francisco 11, Calif.

July 24, 1943

Joe Balestrieri & Co.

432 Clay Street

San Francisco, California

Gentlemen:

Offer to participate in profits of Chrome Milling Operation to be handled by this partnership in consideration of guaranteeing venture.

With reference to letter written by Otto Sales Company to the Pacific Vegetable Oil Corp. dated July 23, 1943, which was written in behalf of Strategic Mineral Exploration Company, we hereby offer you a one-half participation in any profits that the Strategic Mineral Exploration Company may earn. All as outlined in letter attached hereto.

The consideration for this offer is that your corporation agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Corporation on our chrome milling venture.

In the event that you decide to participate in this venture, please have your Board of Directors ratify same and formally confirm same to us in writing.

Yours very truly,

STRATEGIC MINERAL
EXPLORATION CO.,

/s/ W. E. OTTO.

WEO;b

[111]

On July 26, 1943, the directors of petitioner, consisting of Balestrieri and Otto, held a meeting, the minutes of which are as follows:

Consent to a Special Meeting of the Board of Directors of Joe Balestrieri & Co., a Corporation

The Directors of Joe Balestrieri & Co., a corporation, do hereby consent to the holding of a special meeting of said Board of Directors at the office of said corporation, No. 432 Clay Street, San Francisco, California, at the hour of 2:00 p.m. on July 26, 1943.

Present: Joe Balestrieri, President; W. E. Otto, Vice-President.

1. Minutes of previous meeting, dated February 24, 1943 read and approved.

2. The letter addressed to the corporation by the Strategic Minderal [sic] Exploration Company

was submitted and the proposal to participate in one-fourth of the earnings of the Chrome Milling venture at Castella was accepted. The corporation in turn guaranteed any losses or deficits that may occur on money borrowed from the Pacific Vegetable Oil Corporation on the chrome [sic] milling venture.

3. It was ordered and directed that the president accept the offer.

4. Upon motion duly made by W. E. Otto and seconded by J. Balestrieri, it was unanimously voted and approved to accept and confirm all the above.

5. There being no further business, the meeting was adjourned.

Respectfully [sic] submitted to the Board of Directors of the Joe Balestrieri Co. By, Secretary.

Approved:

.,

President.

/s/ W. E. OTTO.

A mistake was made in these minutes (prepared by a daughter of Balestrieri) in that the minutes referred to "one-fourth of the earnings of the Chrome Milling venture" instead of "one-half."

On the same date petitioner wrote the following letter to the partnership: [112]

July 26, 1943

Strategic Mineral Exploration Co.

225 California Street

San Francisco, California

Gentlemen:

This is to acknowledge receipt of your offer of July 24 for our participation in your Chrome Milling venture as Castella, California, all in accordance of letter written to Pacific Vegetable Oil Corporation as of your letter of July 23rd, 1943. Please be advised that we herewith accept this proposal of yours to participate in the profits of your chrome milling operation and we in turn guarantee any losses should they occur. The Board of Directors this day have had a meeting and all the above has been confirmed by them.

Yours very truly,

JOE BALESTRIERI & CO.,

JOE BALESTRIERI,

President.

JB:b

Petitioner's Board of Directors having taken this action, the Pacific Vegetable Oil Corporation consented to and did discount invoices of the partnership in accordance with its proposal outlined in the letter of July 23, 1943.

Before the end of 1943, the partnership had lost approximately \$39,000. The partners decided to cease operations and to liquidate the partnership business. Considerable bitterness developed between

Balestrieri and Otto on one hand and Hoff on the other. Hoff refused to assume any responsibility for the losses of the partnership and "walked out on" Balestrieri and Otto.

There was due to the Pacific Vegetable Oil Corporation, on account of its financial dealings with the partnership, the sum of \$22,229.37. In 1943, petitioner executed its note in that amount to the Pacific Vegetable Oil Corporation, but payments thereon were not made by petitioner until the following year. The other unpaid bills of the partnership, in the approximate sum of \$17,000, were paid gradually by Balestrieri and Otto. [113]

OPINION

Kern, Judge: The question in this proceeding is whether the effect of the transactions detailed in our findings was to make the petitioner a guarantor of the liabilities of the partnership to the Pacific Vegetable Oil Corporation with the secondary liability incident to a guarantee, or, as petitioner contends, made it in effect a participant in a joint venture with the primary liability of one of the venturers. If the petitioner is held to be a guarantor then our decision must be for respondent since petitioner has failed to prove any payment in the taxable year of the obligation guaranteed which would give rise to any indebtedness to it on the part of the members of the partnership who were primarily liable on the obligation to the Pacific Vegetable Oil Corporation, and, even if such an indebtedness had been created, there is no proof that it was worthless in the taxable year.

Petitioner contends that the language used by laymen acting without advice of counsel in the negotiations and instruments incident to the transactions in question was ambiguous, that the testimony of Balestrieri and Otto indicated the intent of the parties to have been that petitioner was to bear all losses, if any, of a joint venture of which it was to be a party, that the large share of the profits of the venture to which petitioner, by virtue of the agreement, was entitled is more consistent with a joint venture than to a guarantee, and that the word "guarantee" though used in the several documents above referred to may describe either a primary or secondary obligation.

We are unable to reach the conclusion to which petitioner's argument would lead us. [114]

The salient facts emerging from the record are these: Petitioner was a small but prosperous corporation controlled by its two stockholders, Balestrieri and Otto, and engaged in the wholesale fish business. These two individuals were convinced by one Hoff, a mining engineer, that a fortune could be made in a chrome mining and milling venture. After some investigation and a preliminary survey, Balestrieri, Otto and Hoff formed a partnership to engage in this venture. The partnership agreement contemplated that Hoff would contribute his services and that Balestrieri and Otto would defray the expenses and the profits, anticipated to be a huge amount, would be divided equally among the three. Funds in a considerable amount became necessary for the purchase of chrome and the

expense of milling it. Otto, on behalf of the partnership, approached the Pacific Vegetable Oil Corporation in an effort to obtain a large part of such funds from this corporation. The corporation would not furnish such funds on the unsecured obligation of the individual partners, but indicated that it would furnish funds if repayment was "underwritten" by petitioner. Thereupon Otto, on behalf of the partnership, wrote to petitioner corporation (all of the stock of which was owned by him and Balestrieri) offering to petitioner "a one-half participation in any profits that [the partnership] may earn" in return for an agreement by petitioner "to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Company on our chrome milling venture." Petitioner's Board of Directors adopted a resolution accepting this offer. Thereafter, the Pacific Vegetable Oil Corporation furnished funds to the partnership. The record does not contain any instrument setting forth the terms of the obligation created thereby. It may be supposed that if any [115] existed it was signed by the three partners. It may also be supposed that the only evidence of petitioner's liability in the transaction is contained in Otto's letter to it, the resolution of its directors, and its letter to the partnership. At that time neither petitioner nor the partnership considered any loss likely in connection with the transactions with the Pacific Vegetable Oil Corporation, or otherwise. When the partnership's business proved unprofitable and was

discontinued, Hoff disappeared from the scene in an atmosphere of mutual recriminations, petitioner gave its note to the Pacific Vegetable Oil Corporation in the approximate amount of \$22,000, then due to that corporation, which was paid by petitioner after the taxable year, and Balestrieri and Otto paid the other accounts due from the partnership in the approximate amount of \$17,000.

These facts persuade us that petitioner's role in the transaction was that of a guarantor of a specific account.

Petitioner places considerable reliance upon the testimony of Balestrieri and Otto, which was rather general in character, to the effect that the parties intended that petitioner should participate as a principal in a joint venture in consideration for its agreement to underwrite and absorb all losses which might be sustained by the venture. Both of these witnesses impressed us as being respectable men, but the force of their testimony is weakened by the following considerations: (1) It was given some five years after the event, (2) it was highly self-serving, and (3) it is inconsistent with the known facts, in that petitioner paid not all of the losses or debts of the venture but only the account of the partnership which it specifically guaranteed.

Petitioner also relies in his argument upon the fact that the consideration moving to petitioner for its assumption of liability in the transaction was unduly generous if the liability assumed was only that of a guarantor, but was not unduly large if it assumed general primary liability for all of

the debts of a joint venture in which it was a participant. The force of this argument, however, is weakened by reason of the fact that Balestrieri and Otto owned all of petitioner's stock and, so far as the record discloses, conducted all of the financial negotiations on behalf of the partnership. Since each of them would receive half of petitioner's profits while receiving only one-third of the profits of the partnership, it was to their interests to divert as much as possible of the large anticipated profits of the partnership to the petitioner corporation regardless of the quid pro quo obtained from petitioner; and we are, therefore, unwilling to look upon the transaction as wholly at arm's length so far as petitioner and those acting for the partnership are concerned.

Since we have decided that petitioner's liability was the secondary liability of a guarantor of a specific account,

Decision will be entered for respondent.

Entered Aug. 2, 1948.

[117]

The Tax Court of the United States
Washington
Docket No. 12834

JOE BALESTRIERI & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered August 2, 1948, it is

Ordered and Decided: That there is a deficiency in excess profits tax of \$25,021.71 for the year 1943.

Entered Aug. 3, 1948.

(Seal) /s/ O. P. LeMIRE,

Judge.

[118]

[Title of Tax Court and Cause.]

ALTERNATIVE MOTION FOR REHEARING
To the Honorable Tax Court of the United States:

Now comes the petitioner above-named and respectfully moves the Court, in the event that its decision in the above-entitled matter entered on August 3, 1948 is permitted to stand, to grant a rehearing in said matter, to be held on the next San Francisco calendar of the Tax Court of the United States.

For cause:

1. In the Findings of Fact and Opinion promulgated on August 2, 1948, the Court on the basis

of an assumed inconsistency, which does not in fact exist, and on the further basis that the unimpeached and uncontradicted testimony of petitioner's principal witness was highly self-serving, found the essential facts to be contrary to petitioner's [128] allegations. It is respectfully submitted that, if under these circumstances, the Court does not so amend its Findings of Fact and Opinion to find in favor of the petitioner, vacate its decision and enter one in accordance with the petitioner's prayer for relief, a rehearing should be granted at which petitioner will be given an opportunity to further support said testimony, and the respondent given an opportunity to controvert the same.

2. It is believed that this Motion is particularly meritorious under the circumstances, in that petitioner believed its former counsel to be qualified to present the matter to the Tax Court, but only discovered on the eve of the hearing that said counsel was not permitted to practice, and thereupon immediately obtained substitute counsel so admitted, but such substitute counsel were not granted time to prepare for the hearing with the consequence that evidence available but not known to such counsel at such time was not presented.

Respectfully submitted,

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

Counsel for Petitioner.

Dated August 26, 1948.

Denied, Sept. 7, 1948.

/s/ JOHN W. KERN,

Judge.

[Endorsed]: T.C.U.S. Filed Aug. 30, 1948. [129]

In the United States Court of Appeals
For the Ninth Circuit.

Tax Court Docket No. 12834

JOE BALESTRIERI & CO.,

Petitioner for Review,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent for Review.

PETITION FOR REVIEW

Joe Balestrieri and Co., a corporation with its principal place of business at San Francisco, California, hereinafter referred to as the Petitioner, by its counsel, Louis Janin, Harold E. Haven and William B. Acton, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on August 3, 1948, pursuant to its Memorandum Findings of Fact and Opinion entered August 2, 1948, determining a deficiency in excess profits tax in the amount of \$25,021.71 for the year 1943.

This petition for review is filed pursuant to the provisions of Sections 1141 and 1142, I.R.C. as amended. [130]

Petitioner filed its income and excess profits tax returns for the year 1943, with the Collector of Internal Revenue for the First District of California, at San Francisco, California, which is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision by the Tax Court of the United States entered August 3, 1948, wherein it is determined that petitioner is liable for a deficiency in excess profits tax of \$25,021.71.

On August 30, 1948, petitioner filed with The Tax Court in the above entitled proceeding, the following motions, to wit: Motion for Correction and Enlargement of Findings of Fact and Opinion, Motion to Vacate Decision, Motion for Reconsideration, and Alternative Motion for Rehearing. All of said motions were denied on September 7, 1948.

The petition for review involves the question whether the Tax Court erred in holding that petitioner was not entitled to a loss deduction in the year 1943 in the sum of \$22,229.37, and the further questions of whether The Tax Court erred in failing to find certain facts and in its rulings on certain motions. [131]

NATURE OF THE CONTROVERSY

The nature of the controversy is as follows:

Issue I

In its income and excess profits tax returns for the year 1943, petitioner deducted as a loss the sum of \$22,229.37. The Commissioner of Internal Revenue disallowed the deduction.

As stated by The Tax Court in its opinion the propriety of the deduction turns upon whether the effect of the transactions detailed in its findings of fact was to make the petitioner a guarantor of

the liabilities of a certain partnership to the Pacific Vegetable Oil Corporation (hereinafter called P. V.O.) with the secondary liability incident to a guarantee or to make petitioner primarily liable to pay the losses suffered by the partnership in certain transactions financed by P.V.O.

A brief summary of the findings of The Tax Court pertinent to the above issue is as follows:

The partnership, Strategic Mineral Exploration Co., proposed to engage in a chrome milling venture and by letter proposed to P.V.O. that it finance the transactions of such venture for a percentage of the profits.

P.V.O. indicated it would agree to the proposal provided petitioner would agree to underwrite any loss which P.V.O. might sustain as a result of its discounting any invoices of the partnership. [132]

The partnership thereupon offered petitioner by letter one-half of its profits in consideration of petitioner agreeing to guarantee the payment of any losses or deficits that might occur on the money borrowed from P.V.O. on the chrome milling venture.

After the approval of the partnership's proposal by the petitioner's board of directors, the petitioner wrote the partnership accepting the proposal.

Before the end of the year 1943 the partnership ceased operations and petitioner executed its note to P.V.O. in payment of the losses of the chrome milling venture.

Petitioner contended before The Tax Court that the exchange of letters between petitioner and the

partnership created a contract between them by which petitioner guaranteed (insured) the partnership against losses in its chrome milling venture financed by P.V.O.

That the agreement between the petitioner and the partnership was for the mutual benefit of petitioner and the partnership and only incidentally for the benefit of P.V.O., and that such contract in effect made petitioner and the partnership joint venturers.

The Tax Court failed and refused to follow the testimony of petitioner's witnesses supporting the foregoing contention, which testimony was unimpeached and uncontradicted, on the mistaken assumption that it was inconsistent [133] with the known facts, and upon the assumption (mistaken as to petitioner's principal witness, W. E. Otto) that it was highly self-serving.

Issue II

Petitioner employed J. L. Flynn, an attorney, to represent it before The Tax Court. Mr. Flynn signed the petition and answered for petitioner on the call of the calendar on March 20, 1948, when the case was set for hearing on March 25, 1948, at 2:00 p.m. In the afternoon of March 24, 1948, William B. Acton, general counsel for petitioner, but not admitted to the Tax Court was advised that Mr. Flynn likewise was not admitted to The Tax Court, and that no person admitted to that Court was prepared to try the case. Mr. Acton advised petitioner to employ Louis Janin and Harold E. Haven, attorneys admitted to The Tax

Court, which employment was accomplished on the morning of March 25, 1948. Mr. Haven, who was representing a taxpayer in the case set for 10:00 a.m. on March 25, 1948, at the opening of Court on that morning filed petitioner's substitution of attorneys, explained the facts to the Court and moved for a continuance of the hearing for sufficient time to permit his partner, Mr. Janin, to prepare petitioner's case for trial.

The motion was denied. [134]

Issue III

On August 30, 1948, petitioner filed with The Tax Court a Motion for Rehearing in order that it might introduce further testimony to amplify and support testimony which The Tax Court had stated in its opinion it was disregarding because such testimony was self-serving and inconsistent with other facts in the record. One of the grounds of said motion was that counsel for petitioner had not been allowed by the Court sufficient time to prepare petitioner's case in the first instance.

The Tax Court, pursuant to its memorandum findings of fact and opinion promulgated August 2, 1948, having on August 3, 1948, entered its decision that there is a deficiency due from petitioner in excess profits tax of \$25,021.71 for the year 1943, and the petitioner having exhausted its remedies before such Court, the petitioner seeks appropriate relief by this petition for review.

ASSIGNMENT OF ERRORS

Petitioner assigns the following errors:

1. The Tax Court erred in failing to determine

as an ultimate fact from the letters exchanged between the partnership and petitioner, the party with whom petitioner contracted. [135]

2. The Tax Court erred in deciding that petitioner was only secondarily liable on the so-called contract of guaranty created by the exchange of letters between the partnership and petitioner.

3. The Tax Court erred in deciding that petitioner did not suffer a deductible loss of \$22,229.37 in the year 1943, the loss sustained on the chrome milling venture.

4. The Tax Court erred in failing to find that the partnership was engaged in a chrome mining venture and a chrome milling venture.

5. The Tax Court erred in failing and refusing to follow the unimpeached and uncontradicted testimony of W. E. Otto on the unsupported assumption that such testimony was highly self-serving and was inconsistent with the known facts.

6. The Tax Court abused its discretion by failing to grant the motion of petitioner for a continuance for sufficient time to permit qualified trial counsel, just employed, to prepare for trial.

7. The Tax Court abused its discretion by failing to grant the motion of petitioner for a rehearing in view of the Court's comments as to the inadequacy of the evidence and in view of the court's refusal to grant qualified trial counsel time to prepare petitioner's case for trial. [136]

8. The Tax Court erred in that its decision is not in accordance with law.

Wherefore, petitioner prays:

That the decision of The Tax Court of the United States in this case be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit;

That a transcript of the entire record be prepared in accordance with the law and the rules of said Court and transmitted to the Clerk of said Court for filing;

That said Court reverse the decision of The Tax Court of the United States and direct the latter Court to modify its findings of fact, opinion, and judgment to permit the deduction of the loss of \$22,229.37 sustained by petitioner in the year 1943; and

For such other and further relief as to the Court may appear just and proper in the premises.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
/s/ WILLIAM B. ACTON,
Counsel for Petitioner.

(Duly Verified.)

[Endorsed]: T.C.U.S. Filed Nov. 1, 1948. [137]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To the Commissioner of Internal Revenue, and to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.

You are hereby notified that the petitioner, on November 1st, 1948, filed with the Clerk of the

Tax Court of the United States, in Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause. A copy of the petition for review is hereto attached and served upon you.

Dated this 1st day of November, 1948.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
/s/ WILLIAM B. ACTON,
Counsel for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Nov. 2, 1948. [139]

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

Joe Balestrieri and Co., petitioner for review, through its attorneys, Louis Janin, Harold E. Haven and William B. Acton, hereby designates the portions of the record and the evidence to be included in the record on review in the above entitled proceedings, as follows:

The entire record, excluding, as duplication, Exhibit A to the amended petition, excluding formal headings, and excluding (because included in the memorandum findings of fact and opinion) petitioner's Exhibits 1, 2, 3 and 5.

You are hereby respectfully requested to prepare and certify the record on review in accordance with the foregoing designation and in accordance with law and the rules of the United States Circuit Court of Appeals for the Ninth [140] Circuit, and to transmit the same to the Clerk of said Court for filing.

Dated November 3, 1948.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
/s/ WILLIAM B. ACTON,
Counsel for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Nov. 5, 1948. [141]

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 141, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 26th day of November, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 12102. United States Court of Appeals for the Ninth Circuit. Joe Balestrieri and Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed November 29, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

The United States Court of Appeals
For the Ninth Circuit.

No. 12102

JOE BALESTRIERI & CO.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

DESIGNATION OF CONTENTS OF RECORD
TO BE PRINTED AND STATEMENT OF
POINTS INTENDED TO BE RELIED
UPON

Now comes the petitioner on review by and through its counsel, Louis Janin, Harold E. Haven, and William B. Acton, and designates the following material as being pertinent to the issues presented upon this review and to be included in the printed transcript, together with the pages in the typewritten transcript certified from the Tax Court of the United States, as follows:

Docket Entries. Amended Petition. Answer to Amended Petition. Transcript of Testimony. Petitioner's Exhibit 4. Respondent's Exhibits A and B. Memorandum Findings of Fact and Opinion. Decision. Alternative Motion for Rehearing—Denied. Petition for Review and Proof of Service. Designation of Contents of Record on Review and Proof of Service Thereon. This Designation and Statement.

Petitioner intends to rely upon the assignments of error set forth in its petition for review and particularly upon the following points as supporting this petition for review:

1. The Tax Court committed error of law when contrary to the unimpeached and uncontradicted and not inherently improbable testimony of petitioner's principal witness, and upon the basis of assumed facts not true, it determined without evidentiary support that the agreement between petitioner and Strategic Minerals Exploration Co., a co-partnership, was one purely of guarantee between petitioner and Pacific Vegetable Oil Corporation.

2. The Tax Court's determination that petitioner did not sustain a deductible loss of \$22,-229.37 in 1943 as the result of its participation in a joint venture with Strategic Minerals Exploration Co. is contrary to the evidence.

3. The Tax Court abused its discretion when it failed to grant petitioner's oral motion to give newly substituted counsel replacing counsel not admitted to practice before the Tax Court, at least two or three days to prepare the proceeding for trial.

4. By reason of the foregoing circumstances and also by reason of the Tax Court's own comments upon the inadequacy of the evidence, the Tax

Court abused its discretion in refusing to grant petitioner a rehearing.

Dated December 7, 1948.

Respectfully submitted,

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

/s/ WILLIAM B. ACTON,

Counsel for Petitioner

On Review.

[Endorsed]: Filed December 7, 1948. Paul P. O'Brien, Clerk.